

**United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001**

'Notice: This is an electronic bench opinion which has not been verified as official'

Date: July 22, 1997

Case No. 95 INA 489

In the Matter of:

PUB VENTURES OF NEW ENGLAND,
Employer

on behalf of

ELVES D. DESOUSA,
Alien

Appearance: Andrew W. Ansara, Lowell, Massachusetts

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Elves D. Desousa (Alien) by Pub Ventures of New England under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at Boston, Massachusetts, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.¹

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On September 2, 1994, Pub Ventures of New England, a restaurant, filed an application for alien employment certification on behalf of the Alien, Elves DeSousa, to fill the position of Head Cook/Shift Supervisor.² Minimum requirements for the position were two years experience in the job offered. AF 32-33. The job applications of both of the two U. S. workers who sought this position in response to the Employer's recruitment efforts were rejected on grounds that they were not qualified for the position. Employer said that one applicant did not appear for his scheduled interview, and that the other applicant never returned the Employer's call for an interview. AF 12-14.

Notice of Findings. On April 11, 1995, the CO's Notice of Findings (NOF) advised that certification would be denied because the CO could not find that there were no qualified U. S. applicants available for the position the Employer offered. AF 08-09. The CO said the U. S. applicant Quinn had more than twenty-five years of experience as owner and operator of a restaurant and catering business, which qualified him for the job. The CO said that merely attempting to contact Mr. Quinn by telephone with no response was not considered to be sufficient recruitment efforts. The CO explained that when an applicant cannot be reached by telephone, it was incumbent upon the Employer to attempt to communicate with the U. S. applicant by Registered Mail.

Rebuttal. The Employer reiterated in its rebuttal that it had made several attempts to contact applicant Quinn by telephone and that it had left messages which were never acknowledged, and its calls to Mr. Quinn were not returned. Employer further said that even though the applicant had many years experience in the restaurant business, it has "not had any successful new hires to

²Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

make the transition from independent owner/operator to the corporate environment." AF 07.

Final Determination. Labor certification was denied by the CO in the Final Determination issued on May 17, 1995. AF 05-06. The CO denied certification on grounds that a U. S. applicant had expressed interest in the job and appeared qualified, but the Employer did no more than make an unanswered phone call to the job applicant, saying that this did not demonstrate a reasonable effort to communicate with the U. S. applicant. Noting that Mr. Quinn's address was available to the Employer, the CO concluded that a certified letter from the Employer would have been a minimally acceptable recruitment effort in the context of this matter.

Appeal. The Employer requested administrative-judicial review of the denial by its letter of June 20, 1995. AF 01-04.

Discussion

If U.S. workers applied and were rejected for the position, the Employer is required to document that their rejection was solely for lawful, job-related reasons. 20 CFR § 656.21(b)(6)³. In justification of its rejection of U. S. applicant Quinn, the Employer said it was unable to contact him. Employer said it called Mr. Quinn's residence on two occasions and left messages that the applicant never responded, concluding, "[W]e had no recourse but to assume he was no longer interested in the position."

We concur in the CO's conclusion that this was not a sufficient basis on which to reject the U. S. applicant, Mr. Quinn. Employer had an obligation to try alternative means of contact. A good faith effort at recruitment under the Act and regulations requires proof of reasonable efforts by the employer to contact the applicants. Mere telephone calls which fail to show that any message reached the job applicant are not sufficient to meet this burden. BALCA repeatedly has held that where the addresses of U.S. applicants were available, as is the case in this proceeding, good faith recruitment requires an attempt to reach the applicant by mail as an alternative mode of communication. **Jerry's Bagels**, 93 INA 461 (June 13, 1994) (employer failed to follow-up unsuccessful telephone contact made to applicant with a letter)⁴ As the panel noted in **G.C.M. Iron Works, Inc.**, 91 INA

³20 CFR § 656.21(b)(6) was previously codified as 20 CFR § 656.21(b)(7).

⁴Also see **L.G. Manufacturing, Inc.**, 90 INA 586 (Feb. 5, 1992) where the employer attempted contact by telephone three times but failed to mail any interview letters; and **William Martin**, 92 INA 249 (June 2, 1991), where employer left a message with "a man" but did not attempt alternative contact by mail.

81(Mar. 27, 1991), where the applicants' addresses were in the record a "certified letter would have been a minimally acceptable effort." We agree with this analysis.

We find that the CO correctly denied labor certification on grounds that the Employer failed to make adequate efforts to contact the well-qualified U. S. applicant for the position at issue.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Case No. 95 INA 489

PUB VENTURES OF NEW ENGLAND, Employer
ELVES D. DESOUSA, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	:	:	:	:
	:	CONCUR	:	DISSENT
	:	:	:	COMMENT
	:	:	:	:
Holmes	:	:	:	:
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Huddleston	:	:	:	:
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Thank you,

Judge Neusner

Date: July 3, 1997